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No.

In the

Supreme Court of the United States

MAHARG, INC.,

Petitioner,

versus

VAN WERT SOLID WASTE MANAGEMENT DISTRICT; GARY D. ADAMS, Chairman of the Board Van Wert Solid Waste Management District; AVA K. GOOD, Director of Van Wert Solid Waste Management District; GARY D. COOPER, Director of Van Wert Solid Waste Management District,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Commerce Clause of the United States Constitution prohibit a county that does not own or operate a landfill from requiring all private waste haulers to dispose of waste they collect from citizens and businesses in the county only at landfills that agree to collect a $5.30 per ton fee for the county?

LIST OF PARTIES

Petitioner

Maharg, Inc.

Respondents

Van Wert Solid Waste Management District

Gary D. Adams, Chairman of the Board, Van Wert Solid Waste Management District

Ava K. Good, Director of Van Wert Solid Waste Management District

Gary D. Cooper, Director of Van Wert Solid Waste Management District

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Maharg, Inc. is a privately-held corporation that has no parent or subsidiaries. No publicly-held company owns more than 10% of the stock of Maharg, Inc.

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Maharg, Inc. ("Maharg") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 249 F.3d 544 (6th Cir. 2001), and is reproduced in the Appendix hereto (App. 1a). The opinion and order of the United States District Court for the Northern District of Ohio is reported at 60 F. Supp.2d 750 (N.D. Ohio 1999), and is reproduced in the Appendix hereto (App. 22a). The order of the court of appeals denying the petition for rehearing is unreported and reproduced in the Appendix hereto (App. 31a).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the decision of the District Court of the Northern District of Ohio was entered on May 7, 2001 (App. 1a) and the petition for rehearing was denied and entered on July 12, 2001 (App. 31a). This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article 1, Section 8, Clause 3

> The Congress shall have Power To … regulate Commerce … among the several States …

Relevant Portion of Ohio Revised Code § 343.01(I)(2)

> If the board of county commissioners of a county [solid waste management] district ... has established facility designations ... no person ... shall deliver, or cause the delivery of, any solid wastes generated within a county ... to any solid waste transfer, disposal, recycling, or resource recovery facility other than the facility designated ....

Ohio Revised Code § 343.99

> Whoever violates division (G)(2) or (3) or (I)(1) or (2) of section 343.01 of the Revised Code shall be fined not more than five thousand dollars. Each day of each violation is a separate offense.

Relevant Portion of Van Wert County Resolution of February 18, 1999

> On and after April 20, 1999, pursuant to [Ohio Rev. Code] section 343.01(I)(2), no person shall deliver, or cause the delivery of, any 'Solid Waste' generated within the District, as defined in the second RFP, to any solid waste facility other than the [eight] designated facilities.

STATEMENT OF THE CASE

Maharg collects solid waste from residential, commercial and industrial customers in several Ohio and Indiana counties, including Van Wert County, an Ohio County located on the Ohio-Indiana border. As required by state and federal law, Maharg hauls the waste only to

properly permitted landfills.[1] Maharg negotiates with landfills to obtain the lowest possible disposal price. Currently, Maharg prefers to use the Jay County Landfill, located in Jay County, Indiana, because it charges a tipping fee of just $23 per ton, it is conveniently located and has favorable operating hours.

The Van Wert Solid Waste Management District (the "District") is a governmental body created by Ohio law that is governed by the Board of County Commissioners of Van Wert County. The District does not own or operate any landfills, nor does it provide or contract for waste collection or disposal services for the citizens of Van Wert County. While the District could obtain revenue through general taxes, bag fees or other more direct taxes on its citizens, it chose a different course.

To generate revenue, the District decided to impose a fee of $5.30 per ton on each ton of waste collected in Van Wert County. The District chose to have the fee collected by landfills and transfer stations that accept waste from haulers such as Maharg. The District apparently recognized the difficulty in attempting to force landfills, particularly those in another state, to collect the fee. Thus, the District decided to use its regulatory powers to strictly control the market for solid waste to only those facilities willing to enter a "contract" for collection of the District's fee. To that end, the District developed a "Request for Proposals" ("RFP") that was sent to thirteen landfills in the area, including the Jay County Landfill, and notice of which was published in Ohio and Indiana newspapers. The RFP offered landfills the non-

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[1] Ohio Rev. Code § 3734.03 states that "no person shall dispose of solid wastes by open burning or open dumping." Ohio Rev. Code § 3734.01(I) defines open dumping as "the depositing of solid wastes . . . at a site that is not licensed as a solid waste facility." *See also* 42 U.S.C. §§ 6943(a)(2) and 6944(b).

exclusive right to continue accepting waste from Van Wert County in exchange for, among other things, collecting the fee.

The District actually sought proposals twice because the first attempt netted only three facilities willing to enter the agreement, a number the District apparently felt was too few. After the second RFP process, eight facilities – seven in Ohio and one in Indiana – responded to the RFP and entered into a 30-plus page designation agreement with the District.

To guarantee collection of the fee, the District adopted a "flow control" regulation "designating" the eight facilities and requiring all haulers to deliver the waste they collected in Van Wert County only to the designated facilities after April 20, 1999. It is this flow control regulation that Maharg challenges. The Jay County Landfill was not designated because it declined to enter an agreement with the District. Maharg then received a written threat from the District stating that if it hauled waste to any undesignated landfill it would be fined up to $5,000 per day.

Maharg brought an action against the District seeking a declaration that the flow control regulation was unconstitutional and damages caused by increased operating costs. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4) because Maharg's claims arise under the United States Constitution and Maharg seeks to recover damages and secure equitable relief under an Act of Congress providing for the protection of civil rights, namely 28 U.S.C. § 1983. The District did not answer but rather moved to dismiss the complaint.

Without oral argument or the taking of any discovery, the District Court for the Northern District of Ohio dismissed Maharg's complaint pursuant to Fed. R. Civ. P. 12(b)(6). The court held that because the Jay County Landfill was

given the same opportunity to be designated as the Ohio landfills, there was no "discrimination" against interstate commerce. Following the test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the court then weighed the burden on interstate commerce against the local benefits of the regulation. The court held there was not likely any "incidental burden" on interstate commerce and that "any incidental burden on interstate commerce is unrelated to discrimination against nonresidents, and this is the fatal flaw of plaintiff's 'dormant' Commerce Clause argument."

(App. 27a–28a). The Sixth Circuit's jurisdiction was invoked pursuant to 28 U.S.C. § 1291 through a timely filed appeal.

The Sixth Circuit rejected Maharg's initial argument that, barring Congressional authorization, the District lacked the power to directly regulate interstate commerce in this fashion, stating:

> Although there have been periods in our legal history when the constitutionality of state taxes and other measures burdening interstate commerce was thought to turn on the answer to the question whether the burden was "direct" or "indirect" (*see, e.g., Freeman v. Hewit*, 329 U.S. 249, 256 (1946)), that test now appears to have been repudiated for good – or at least for the present. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

(App. 7a).

The Sixth Circuit then considered Maharg's second argument that the regulation "discriminates" against interstate commerce facially, purposefully and in practical effect. The court held the resolution did not discriminate facially because Maharg was forbidden from disposing waste at the Jay

County Landfill, not because the landfill was in another state, but because the landfill refused to sign the agreement with the District. (App. 9a-10a).

Maharg also argued that the scheme may have had a discriminatory purpose to favor smaller local haulers who used local and higher cost landfills over larger haulers such as Maharg who used equipment, manpower and economies of scale to haul further distances and obtain lower landfill pricing. The court dismissed the argument as speculative notwithstanding the fact that the complaint was dismissed under Fed. R. Civ. P 12(b)(6). (App. 11a).

In evaluating whether the regulation discriminated in practical effect, the court referenced Justice O'Connor's concurring opinion in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994), but concluded that the regulation would not create the type of balkanization the Commerce Clause is intended to prevent. The court concluded "[i]f every county in both Indiana and Ohio were to adopt a regulatory scheme identical to Van Wert County's, we have no reason to suppose that the movement of waste between the two states would be eliminated or severely impaired." (App. 13a).

The court also concluded that the practical effect of the regulation did not deprive Maharg of the competitive advantage it had gained by utilizing the interstate market. Relying upon this Court's decision in *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978), the court held "it seems to us, *Exxon* shows a willingness on the part of the Supreme Court to engage in some fairly fine slicing and dicing of the practical effects of state legislation in order to avoid the necessity of finding the legislation discriminatory." (App. 15a). Ultimately the court found no discrimination in practical effect because any discrimination could have been

avoided had the Jay County Landfill simply entered into the agreement with the District.

Finding no discrimination, the court then undertook the *Pike* analysis of balancing the burden on interstate commerce against the putative local benefits. Without the benefit of any evidence from discovery, the court declared the benefit of the resolution was "obvious," namely "providing for the safe and sanitary management" of solid waste generated in the county. (App. 17a). Regarding the burden, the court noted that "[w]e have no quarrel with Maharg's submission that the operation of the scheme places a burden on interstate commerce. But neither do we have any reason to doubt that the burden is in line with the cost of ensuring safe and sanitary management of the county's output of solid waste." (App. 18a). Therefore, the court held the District's scheme did not violate the Commerce Clause.

REASONS FOR GRANTING THE WRIT

Since the Court's decision in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), the federal docket has been "clogged with – of all things – garbage."[2] While local governments have parsed the *Carbone* decision to craft new flow control schemes, the courts subjecting the schemes to this Court's dormant Commerce Clause "discrimination" and "balancing" tests have come to conflicting conclusions.[3]

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[2] *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 261 F.3d. 245, 252-53 (2nd Cir. 2001) (citing the *Maharg* case as one of the "clogs").

[3] See *generally, United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 261 F.3d. 245 (2nd Cir. 2001) (regulation did not discriminate but remanded for balancing); *U&I Sanitation v. Columbus*, 205 F.3d 1063 (8th Cir. 2000) (regulation did not discriminate but failed balancing); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999) (regulation did not discriminate or fail balancing); *United Waste Sys. of Iowa, Inc. v. Wilson*, 189 F.3d 762 (8th

Meanwhile, every session of Congress since *Carbone* has considered bills that would give tightly prescribed flow control authority to local governments for a limited number of years, but none of these bills have passed. *See infra* pp. 10-11. Since *Carbone*, the U.S. Environmental Protection Agency also authored a report to Congress that concluded flow control provides virtually no environmental or public safety benefits and is nothing more than a convenient means of generating revenue for local government. *See infra* pp. 12-13.

This case demonstrates the extremes to which local governments are interfering with commerce to latch onto garbage leaving their jurisdictions in order to collect revenue. Solid waste flow control is a nationwide issue that has not been resolved after seven years of congressional debate and numerous court decisions in the wake of *Carbone*. It is important for this Court to clean up the clutter with a bright line ruling, as many thought it had accomplished in *Carbone*.[4] Without such a ruling, local governments will

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Cir. 1999) (Iowa flow control law did not discriminate or fail balancing); *Waste Management of Tennessee, Inc. v. Metro. Gov't of Nashville and Davidson County*, 130 F.3d 731 (6th Cir. 1997) (regulation discriminates); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997) (regulation of out-of-state shipments discriminates but regulation regarding in-state shipments remanded for balancing); *Atlantic Coast Demolition & Recycling v. Bd. of Chosen Freeholders*, 112 F.3d 652 (3rd Cir. 1997) (New Jersey flow control law discriminates); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3rd Cir. 1995) (remanding holding that the process used to establish flow control is determinative of whether it discriminates); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995) (regulation discriminates). There are many more district court cases evaluating flow control schemes also coming to varying conclusions.

[4] The Bond Market Association, *Flow Control: Action is Needed to Protect Outstanding Bonds*, (Visited May 21, 2001) <http:www.bondmarkets.com/legislative/FLOWCON.shtml> ("flow control as a means of implementing future solid waste disposal policy is

continue to devise flow control schemes, the parties adversely affected will have no choice but to continue to seek recourse in the courts, the courts will continue to reach different conclusions, and solid waste, unlike any other article of commerce, will continue to be subjected to balkanized regulation that is designed to facilitate collecting revenue. Without intervention, this case and others like it will only continue to erode the *Carbone* decision and fundamental Commerce Clause principles for which it stands.

A. The use of flow control regulation to restrict the flow of waste in interstate commerce remains an important national issue that needs to be resolved by this Court.

Every citizen and business in America generates waste from their everyday existence – some 220 million tons of it a year.[5] A large portion of that waste is handled by America's estimated 15,500 independent waste haulers such as Maharg.[6] The solid waste industry generated an estimated $43.3 billion in revenue and employed approximately 367,800 people in 1999. *Id.* This segment of the economy is

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no longer viable. Local governments have largely conceded that they will not be permitted to initiate new projects supported by flow control in the future. The issue before Congress presently involves how best to make a smooth transition from dependence on flow control to the principles embodied in the Carbone decision."); National Association of Counties, *NACo Fact Sheet – Waste Flow Control* (visited May 16, 2001) <http://www. naco.org/leg/facts/httoc.cfm> ("Congress must dispose of the constitutional barrier to flow control by authorizing local governments to designate facilities to which municipal solid waste can be directed.")

[5] U.S. Environmental Protection Agency, Office of Solid Waste, *Frequently Asked Questions About Waste*, (visited October 5, 2001) <http://www.epa.gov/epaoswer/osw/basifact.htm#howmuchmsw>.

[6] R.W. Beck, et al., *Size of the U.S. Solid Waste Industry* (2000) (study commissioned by the Environmental Research and Education Foundation).

seriously impacted by the decision below because it renders an ongoing Congressional debate moot, it results in the balkanization the Commerce Clause was intended to prevent, and it leaves the rights of thousands of independent haulers to engage in interstate commerce to the whim of local government and large landfill operators.

The need for national uniformity on this issue is underscored by the fact that, since the Court's decision in *Carbone*, *every* session of Congress has considered but not passed a single bill that would override *Carbone* to grant limited flow control powers to local governments.[7] Most of the bills consist primarily of "bail out" legislation for communities that used flow control prior to *Carbone* to finance government-owned or operated facilities and equipment. *See* H.R. 1214, 107th Cong. § 2(a) (2001). The bills currently pending in the 107th Congress would only allow local governments to implement "new" post-*Carbone* flow control, such as that enacted by the District in this case, for a period of 20 years. *Id* at § 2(k). Even then, such authorization would only apply where states had mandated that the local governments implement solid waste management plans prior to *Carbone* and would require all revenue generated by flow control be used "strictly" to implement waste management programs. *Id.* Not only has Congress failed to enact any bill, or even send one out of committee in years, it is clear that Congress has no intention

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[7] Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. § 2 (2001); Solid Waste Interstate Transportation and Local Authority Act of 2001, S. 1194, 107th Cong. § 3 (2001); Solid Waste Interstate Transportation and Local Authority Act of 1999, H.R. 1190, 106th Cong. § 3 (1999); S. 663, 106th Cong. § 3 (1999); Municipal Solid Waste Flow Control Act of 1997, H.R. 943, 105th Cong (1997); S. 899, 105th Cong. (1997); State and Local Government Interstate Waste Control Act of 1995, H.R. 1180, 104th Cong. (1995); S. 485, 104th Cong. (1995); Municipal Solid Waste Flow Control Act of 1994, H.R. 4643, 103rd Cong. (1994); S. 2227, 103rd Cong. (1994).

of giving local government the unfettered flow control authority granted by the Sixth Circuit in this case.

The decision below renders the congressional debate moot because it takes the issue out of the hands of Congress. Based on this decision, all that is necessary to enact flow control is an "open, fair and non-exclusive" RFP process that results in a contract that extracts whatever "fees" and other items the local government chooses to demand from the landfills. Review is needed to place this important nationwide issue squarely in the hands of Congress.

A second important reason to review the decision below is that it places substantial and excessive burdens on interstate commerce involving solid waste as a whole. As Justice O'Connor observed in her concurring opinion in *Carbone*, "pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." 511 U.S. at 406 (*citing H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949)). The decision below will only proliferate local flow control regulations that result in such balkanization.

The decision below grants local government the power to unconditionally tie a string on waste exported from within its boundaries. Just like any other commodity, waste collected from within multiple jurisdictions is commingled in commerce, be it on the collection trucks, at a transfer station or at a landfill. The strings attached by each district through their own versions of flow control will require that the commodity be segregated and directed in commerce based exclusively on where it originated. This is not a hypothetical problem.

Like most haulers, Maharg's collection routes cross multiple districts, oftentimes using the same truck. Maharg has few options if the decision below is upheld. It can break

up its efficient routes district-by-district and have trucks running half full. It could be fortunate enough to have all the various districts designate at least one common landfill, something that will only happen by chance. Of course, it will be charged multiple and different district fees on a single truckload based on the portions of each truckload coming from each district. Maharg's only other option is to have the drivers weigh each garbage can and record the exact tonnage of waste collected from each jurisdiction and then drive around to multiple landfills and dump just the right amount of waste off the trucks. This does not even take into consideration the higher tipping fees charged by its non-preferred landfill or the administrative and other burdens placed on landfills by the contracts. Thus, flow control regulation creates a very real and overwhelming burden on interstate commerce.

The Sixth Circuit's holding that this extreme burden was justified to ensure the "safe and sanitary management" of solid waste lacks any basis. (*See* App. 17a). The sole purpose of flow control is to generate revenue. In the wake of *Carbone*, Congress requested the U.S. Environmental Protection Agency to report on solid waste flow control in America. The Agency found, among other things, that

> there are no empirical data showing that flow control provides more or less protection [of human health and the environment] . . . Although flow controls have provided an administratively efficient mechanism for local governments to plan for and fund their solid waste management systems, there are alternatives. . . . Accordingly, there are no data showing that flow controls are essential either for the development of new solid waste capacity or for the long-term achievement of

State and local goals for source reduction, reuse and recycling.[8]

Another important reason to review the decision below is that it strips away the protected rights of America's estimated 15,500 independent waste haulers to freely engage in interstate commerce. These haulers, many of which are small family-owned businesses like Maharg, do not own or operate landfills that can be designated. Thus, they have no voice in the government's "open, fair and non-exclusive" process that dictates who they must buy waste disposal services from. Flow control regulation is substantively no different than telling these haulers from whom they must buy trucks, tires and fuel, something that strikes at the foundation of the Commerce Clause.

The decision below also places the independent haulers at the mercy of large waste companies that own the landfills and captive collection and hauling operations that compete head-to-head with the independent haulers for customers. The company that now owns the Jay County Landfill would not need to endure the hassle of Van Wert's contract at that landfill to maintain its own business interests in Van Wert County. That company chose to have Van Wert designate its northern Ohio landfills, where its Van Wert hauling operations are based. Thus, the daily operations of many landfill operators are largely unchanged, while independent haulers are left to see how the "process" pans out. As discussed below, the Commerce Clause and the Court's prior decisions prohibit this from happening.

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[8] U.S. Environmental Protection Agency, Office of Solid Waste, Municipal and Industrial Solid Waste Division, *Report to Congress: Flow Controls and Municipal Solid Waste*, EPA 530-R-95-008 (March, 1995) pp. II-5 and III-76.

B. There is a conflict that must be resolved between the decision below and this Court's Commerce Clause cases.

This petition should be granted because the decision below directly conflicts with this Court's prior Commerce Clause jurisprudence that restricts the ability of States and local government to block the free flow of solid waste, to impose extraterritorial regulation and to block access to the national market for goods and services.

1. The decision below conflicts with prior decisions of this Court restricting the power of States and local government to control the movement of waste.

The Court's prior solid waste cases make it clear that the District has "no power to prevent privately owned articles of trade from being shipped and sold in interstate commerce..." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). The Commerce Clause imposes constraints on the ability of a local government to regulate business transactions involving "'sales' of garbage or 'purchases' of transportation and disposal services." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359 (1992). Consequently, the District simply may not

> justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites.... To do so would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other States.

C&A Carbone v. Clarkstown, 511 U.S. at 393.

The Sixth Circuit's decision conflicts with these holdings because it grants Ohio's 52 solid waste districts the power to control the movement of the 20 million-plus tons of solid waste generated in the state each year. The districts now have the power to not only steer waste leaving their borders, but to substantially interfere with longstanding private contractual sales of Ohio waste to landfills in any other state. This Court has never held such powers exist without an act of Congress.

The right to harvest, sell and ship goods in interstate commerce without undue restriction is not a privilege derived from state or local laws. *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 198-99 (1925). While Congress has the power to authorize flow control to direct the movement of waste, until it does "States are not free from constitutional scrutiny when they restrict that movement." *Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978).

2. The decision below conflicts with prior decisions of this Court restricting the power of States and local government to regulate commerce occurring beyond their boundaries.

In the context of perhaps the second most controversial article of commerce of recent times – alcohol – the Court has consistently held that state and local government have no power to control commerce outside their jurisdiction.

> [A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the

> legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

Healy v. The Beer Institute, 491 U.S. 324, 336 (1989) (citations omitted).

The decision below conflicts with *Healy*. The essence of the District's – and any flow control regulation – is to control commercial transactions outside the jurisdiction by either forbidding them altogether, as was the case in *Carbone*, or ensuring that they occur only at a chosen location, as is the case here. Whether this is labeled discriminatory, direct or clearly excessive regulation, the seed from which this body of law has grown reserves to Congress the power to so regulate these out-of-state transactions. The decision below gives local government unfettered discretion to issue the following ultimatum to landfills in any state – agree to our non-negotiable contract or be cut-off from our waste exports. It also grants power to issue an ultimatum to haulers and generators of waste dictating who they must buy waste disposal services from. Neither Congress nor this Court have given local government that power and the Sixth Circuit was wrong in so doing.

In the context of extraterritorial regulation, the Sixth Circuit's decision also conflicts with *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), a case the Sixth Circuit relied upon in its opinion that was not cited or briefed by either party below. *Quill* struck down a North Dakota tax imposed upon out-of-state mail order companies that had no other contacts with the state than the shipment of goods via common carrier. In light of *Quill*, the District surely lacks the power to issue ultimatums to out-of-state landfills that do nothing more than receive waste exports via common carrier.

3. The decision below strips away the haulers' right to access the national market that this Court's decisions have always protected.

The decision below conflicts with the fundamental Commerce Clause principle that:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.... Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

General Motors Corp. v. Tracy, 519 U.S. 278, 299-300 (1997) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)).

Just as a farmer harvests grain from Van Wert County fields, Maharg harvests waste from its residents and businesses. Unlike Van Wert County grain that is freely exported into nationwide markets, the waste can only be exported to the eight facilities that conceded to the District's ultimatum.

The Sixth Circuit found that the District's flow control deprived Maharg access to the national market for waste disposal services. (App. 8a). However, the court held this to be insignificant because there was no reason to suppose Maharg really wanted access to any landfill other than the Jay County Landfill. But this is true in any Commerce Clause case. There was no reason to suppose

Philadelphia wanted access to Oregon landfills when it sued New Jersey. The holding below conflicts with the Court's prior solid waste cases because it allows local governments to isolate themselves from the national economy. This Court soundly rejected such attempts in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992), and *Carbone*.

Fort Gratiot reiterated the "long recognized" rule that the Commerce Clause prohibits states from advancing "their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." 504 U.S. at 359 (*quoting H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949)). In *Fort Gratiot*, Michigan sought to protect its landfill capacity by curtailing the flow of waste into the state. The District seeks to protect its checkbook by curtailing the movement of waste out of Van Wert County. The Michigan law was struck down *even though* Michigan allowed out-of-state imports with state approval. The Sixth Circuit upheld the District's regulation *because* it allows out-of-state exports with District approval. The cases are fundamentally indistinguishable except for the direction the waste is flowing and the governmental interest being asserted.

C. Despite the Court's opinion in *Carbone*, the lower courts remain in disarray on the issue of flow control.

As noted *supra* pp. 7-8, the variations of flow control schemes and the divergence in decisions of the lower courts has fully neutralized the *Carbone* decision and left this area of the law in complete disarray. For example, shortly after *Carbone*, in the Southern District of Ohio which includes some of the counties Maharg services, Judge Rice held that a flow control regulation requiring all waste to be hauled either

to one local Ohio facility or "any out-of-state" facility did not discriminate against interstate commerce nor impose a burden that was clearly excessive in light of the local benefit. *Vince Refuse Serv. Inc. v. Clark County Solid Waste Management District*, 1995 U.S. Dist. LEXIS 5008 (S.D. Ohio 1995). In contrast, the Eighth Circuit recently held a virtually identical regulation unconstitutional because its burdens exceeded its benefits. *U&I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000).

In *Waste Management, Inc. of Tennessee v. Metropolitan Government of Nashville and Davidson County*, 130 F.3d 731 (6th Cir. 1997), the Sixth Circuit did not consider the process used to establish a flow control regulation requiring most of the county's waste to be disposed of only at designated sites. Rather, the court simply followed *Carbone* and struck the regulation as discriminatory. In *Maharg*, another panel of the Sixth Circuit held that a regulation directing *all* waste to designated sites chosen through an "open, fair and non-exclusive process" does not discriminate or burden interstate commerce.

As an example of the extent to which *Carbone* has been eroded by the lower courts, in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 261 F.3d 245 (2nd Cir. 2001), the court upheld a flow control regulation requiring that all waste generated in the counties be disposed only at one of five county-owned facilities. The Second Circuit distinguished that case from *Carbone* based upon the fact that the facility in *Carbone* was technically a privately owned facility and the Oneida-Herkimer facilities were government-owned. The Second Circuit glossed over the fact that the facility in *Carbone* was *built for* the Town of Clarkstown and *financed by* the town's unconstitutional five-year long flow control plan at the end of which it would buy the facility for $1.

CONCLUSION

The common vice of all the flow control regulations is the havoc wreaked by allowing local government to steer exported commodities through commercial channels. No other commodity has been subjected to such treatment without comprehensive national regulation. Unless and until this Court issues a decisive ruling that – absent an act of Congress – local flow control of any kind violates the Commerce Clause, the nuances of *Carbone* will continue to be exploited by local government and the lower courts will continue to be clogged with – of all things – garbage. This case presents a perfect opportunity to clear the clutter of flow control cases from the lower courts.

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)
No. 99-4035

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MAHARG, INC.,
Plaintiff-Appellant,

v.

VAN WERT SOLID WASTE MANAGEMENT DISTRICT; GARY D. ADAMS, Chairman of the Board Van Wert Solid Waste Management District; AVA K. GOOD, Director of Van Wert Solid Waste Management District; GARY D. COOPER, Director of Van Wert Solid Waste Management District,
Defendants-Appellees.

December 5, 2000, Argued

May 7, 2001, Decided

May 7, 2001, Filed

COUNSEL:
ARGUED: Kevin N. McMurray, FROST & JACOBS, Cincinnati, Ohio, for Appellant.

Albin Bauer, II, EASTMAN & SMITH, Toledo, Ohio, for Appellees.

ON BRIEF: Kevin N. McMurray, Christopher S. Habel, FROST & JACOBS, Cincinnati, Ohio, for Appellant.

Albin Bauer, II, Henry N. Heuerman, EASTMAN & SMITH, Toledo, Ohio, for Appellees.

JUDGES:
Before: MERRITT, NELSON, and BATCHELDER, Circuit Judges.

OPINIONBY:
DAVID A. NELSON

OPINION:

DAVID A. NELSON, Circuit Judge. The question presented in this appeal is whether the constitutional rights of the plaintiff, an Ohio corporation engaged in the business of solid waste collection and disposal, were violated by waste processing restrictions imposed under Ohio law by the county where the waste originated. The restrictions in question precluded the plaintiff from continuing to dispose of the waste at an Indiana landfill the operator of which had declined to meet the county's conditions for designation of the landfill as an approved disposal site - conditions that included execution of a standard-form agreement to collect a prescribed per-ton surcharge and remit it to the county.

In a decision reported at *60 F. Supp. 2d 750 (N.D. Ohio 1999)*, the district court dismissed the action under Rule 12(b)(6), Fed. R. Civ. P. We shall affirm the dismissal.

I

The plaintiff, Maharg, Inc., collects solid waste from residential, commercial and industrial customers of which some 400 are located in Northwestern Ohio's Van Wert County. Prior to April of 1999 Maharg patronized a sanitary landfill located in an adjacent jurisdiction - Jay County - in

Indiana. All of the waste that Maharg collected in Van Wert County was hauled to the Jay County facility for disposal.

Defendant Van Wert Solid Waste Management District is a public entity formed pursuant to Chapters 343 and 3734 of the Ohio Revised Code. The district has boundaries that are coterminous with those of Van Wert County, and the entity is headed by a board of directors made up of the members of the county's board of commissioners. (For the sake of convenience, we shall use the terms "district" and "county" interchangeably in this opinion.)

The district maintains a solid waste management plan pursuant to Ohio Rev. Code § 3734.54. As permitted by Ohio Rev. Code § 3734.53(E)(1), the plan states that the board is authorized to make "facility designations" under Ohio Rev. Code § 343.014. The effect of this statement, under the latter section of the code, is to allow the board to "designate solid waste disposal, transfer, or resource recovery facilities . . . where solid wastes generated within or transported into the district shall be taken for disposal . . . ." Ohio Rev. Code § 343.014(A). It is through such facility designations that the board conducts what Maharg refers to as "flow control."

Ohio Rev. Code § 343.014 contains detailed procedural requirements for making solid waste facility designations. The process begins with adoption of a resolution in which the board expresses an intent to designate such facilities. See Ohio Rev. Code § 343.014(B). The Van Wert board adopted a resolution of this type on August 6, 1998.

The board's resolution included a request for the submission of proposals by operators of solid waste facilities in the Northwestern Ohio-Northeastern Indiana area. The request explained, among other things, that each successful designee would be required to execute a "designation agreement" obligating the designee to collect a "contract fee" of $ 5.30 for each ton of solid waste generated within the

district and delivered to the designated facility. The resolution further explained that these fees - which were to be remitted to the district monthly - had been set at a level determined "on the basis of anticipated financial need of the District in implementing the Plan and enforcing compliance with facility designations."

Copies of the request for proposals were sent to the operators of 13 solid waste facilities considered to be within a reasonable distance. (Eleven of these facilities are in Ohio and two are in Indiana.) The board also published notice of the request for proposals in Ohio and Indiana newspapers.

On August 27, 1998, the board opened sealed bids submitted in response to its solicitation. The board then adopted a resolution notifying the public that it proposed to designate six solid waste facilities - four in Ohio and two in Indiana - as the only facilities authorized to receive waste generated within the district. The first of the facilities so identified was the one Maharg had been using - the Jay County landfill in Portland, Indiana. That facility is operated by Jay County Landfill, Inc., an affiliate of the Waste Management organization.

On September 8, 1998, after an opportunity for public comment, the board adopted a resolution designating four solid waste facilities - two in Ohio and two in Indiana - as the facilities authorized to receive waste generated in Van Wert County. The designations, which were subject to the execution of designation agreements by the facilities' owners or operators, named the Jay County landfill as one of the approved facilities.

The designation of the Jay County landfill was rescinded by resolution adopted on November 24, 1998. The reason for the recission, the resolution explained, was that "Jay County Landfill, Inc. has informed the Solid Waste District that it will not enter into a designation agreement with the District

nor will it participate in any re-bid of the District's facility designations."

With only three facilities now on the approved list, the board decided to issue a second request for proposals. In an apparent effort to promote wider participation on the part of prospective designees, the board dispensed with an earlier requirement for price-per-ton bids.

Copies of the second request for proposals were sent to the operators of 15 solid waste facilities, including the Jay County landfill operator. Jay County Landfill, Inc., did not submit a bid, but bids were received from the operators of eight other facilities. Two of these facilities are located in Van Wert County,[1] five are located elsewhere in Ohio, and one is located in Fort Wayne, Indiana.

On January 15, 1999, the board adopted a resolution proposing to include all eight facilities on the list of designees. Public comment was again invited.

Maharg's lawyers sent the board a letter expressing strong opposition to the proposed designation. Among other things, the letter contended that "by authorizing only one facility outside of the State of Ohio to accept Van Wert County generated waste, the District's proposed designation violates the Commerce Clause of the U.S. Constitution . . . ." Among the cases cited in support of this proposition was *C&A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994).*

The board was evidently unpersuaded. On February 18, 1999 - the same day on which Maharg's letter was transmitted to the board by facsimile - the board adopted a resolution designating the eight facilities as the only ones authorized to receive solid waste generated within the district. As before, the designations were subject to the execution of acceptable designation agreements. The resolution further provided as follows:

> "On and after April 20, 1999, pursuant to [Ohio Rev. Code] section 343.01(I)(2), no person shall deliver, or cause the delivery of, any 'Solid Waste' generated within the District, as defined in the second RFP, to any solid waste facility other than the [eight] designated facilities . . . ."

From and after April 20, 1999 - absent a waiver granted under Ohio Rev. Code § 343.01(H)(2)[2] - Maharg would have been subject to a fine of not more than $ 5,000 per day had it continued to use the Jay County landfill as a disposal site for solid waste generated in Van Wert County. See Ohio Rev. Code § 343.99. Maharg promptly brought suit against the district and the members of its board of directors, alleging that the defendants had imposed an impermissible restriction on the free flow of interstate commerce in violation of Maharg's constitutional and civil rights. Maharg's verified complaint, which set forth the facts summarized above, concluded with a prayer for declaratory, injunctive, and monetary relief.

The defendants demurred to the complaint, moving for dismissal pursuant to Rule 12(b)(6), Fed. R. Civ. P. The district court granted the motion. See *60 F. Supp. 2d at 755.* This appeal followed.

II

Maharg's principal argument on appeal is that Van Wert County's prohibition against disposal of solid waste at any landfill the operator of which has not sought and obtained a facility designation from the county and has not agreed to collect and remit the $ 5.30 per-ton contract fee violates the negative implications (the so-called "dormant" aspect) of the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. Maharg further contends that the prohibition violates Maharg's rights under the Equal Protection and Due Process Clauses of the

Fourteenth Amendment. (The complaint also asserted a state law claim for tortious interference with Maharg's contractual rights, but that claim appears to have been abandoned in the district court and is not pressed on appeal.) We shall address the constitutional arguments in the sequence in which Maharg has presented them to us.

A

1

Maharg's first line of attack under the Commerce Clause is based primarily on a passage from the opening paragraph of Part V of the plurality opinion in *Edgar v. Mite Corp., 457 U.S. 624, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982)*. Speaking for himself and three other members of the Court, Justice White said there that "the Commerce Clause . . . permits only incidental regulation of interstate commerce by the States; direct regulation is prohibited." *Id. at 640.*

Van Wert County's scheme constitutes a "direct regulation" of interstate commerce, Maharg submits, "because it expressly bans interstate trade with any of the thousands of undesignated landfills nationwide." As a "direct regulation" of interstate commerce, Maharg contends, the Van Wert County scheme is prohibited regardless of any beneficent purpose that may underlie it.

Although there have been periods in our legal history when the constitutionality of state taxes or other measures burdening interstate commerce was thought to turn on the answer to the question whether the burden was "direct" or "indirect" (see, e.g., *Freeman v. Hewit, 329 U.S. 249, 256, 91 L. Ed. 265, 67 S. Ct. 274 (1946)*), that test now appears to have been repudiated for good - or at least for the present. See *Quill Corp. v. North Dakota, 504 U.S. 298, 119 L. Ed. 2d 91, 112 S. Ct. 1904 (1992)*, where the Court explained that the earlier caselaw's "formal distinction between 'direct' and 'indirect' taxes on interstate commerce" - a distinction with an

on-again-off-again history - had been rejected in *Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 281, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977). Quill, 504 U.S. at 310.* What is important, the Supreme Court now believes, is the "practical effect" of the challenged tax. Quill, id., quoting *Complete Auto, 430 U.S. at 279.* [3]

Looking at the practicalities of the case at hand, we find that while it may be true in a formalistic sense that Maharg is precluded from disposing of Van Wert County solid waste at "thousands of undesignated landfills nationwide," there is no reason to suppose that Maharg has the slightest interest in disposing of Van Wert County waste at any undesignated landfill other than the one it formerly patronized in nearby Jay County. The practical effect of Van Wert County's scheme - and what Maharg is really complaining about - is that the Jay County landfill has been put off limits for Van Wert County waste because of the refusal of the operator of the Jay County facility to enter into a designation agreement obligating it to collect a $ 5.30 per ton contract fee (a tax, in economic effect) on behalf of Van Wert County.

The constitutionality of this $ 5.30 per ton burden on interstate commerce is not to be determined, as we see it, under the "direct/indirect" test. It is to be determined, rather, under a line of waste disposal cases that includes *Philadelphia v. New Jersey, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1992);* [**13] *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 119 L. Ed. 2d 139, 112 S. Ct. 2019 (1992); Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of the State of Oregon, 511 U.S. 93, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994);* and *C&A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994).*

The rule that has evolved in this line of cases is that the constitutionality of a municipal waste disposal ordinance affecting interstate commerce turns on "two lines of analysis: first, whether the ordinance discriminates against interstate commerce, *Philadelphia, 437 U.S. at 624;* and second, whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits,' *Pike v. Bruce Church, Inc., 397 U.S. 137, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)." C&A Carbone, 511 U.S. at 390.* We address these lines of analysis in turn.

2

"The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests." *C&A Carbone, 511 U.S. at 393.* The term "discrimination," in this context, "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste, 511 U.S. at 99.* Such differential treatment is normally equated with "simple economic protectionism" - and "a virtually per se rule of invalidity has been erected with regard to such protectionism." *Philadelphia, 437 U.S. at 624.*

a

At issue in Philadelphia was a New Jersey statute which, with certain narrow exceptions, prohibited anyone from bringing into New Jersey "any solid or liquid waste which originated or was collected outside the territorial limits of the State . . . ." *Id. at 618.* Because this statute discriminated on its face against commerce in non-New Jersey waste, as contrasted with commerce in waste collected within the state, the Supreme Court held the statute to be in violation of the Commerce Clause.

Maharg suggests that the scheme adopted by Van Wert County likewise discriminates on its face against interstate commerce. Although the county's scheme allows solid waste

generated within the county to be disposed of at any of seven Ohio landfills, Maharg complains in its opening brief on appeal, the scheme "restricts solid waste exports to but one out-of-state landfill . . . ."

Unlike the restriction at issue in Philadelphia, however, the restriction imposed by Van Wert County is not territorially based. Maharg's complaint and the exhibits attached to it show that Maharg is not being forbidden to dispose of its Van Wert County waste at the Jay County landfill because that landfill is located in Indiana. The bidding process described in Part I above ignored county and state lines; the process was open on an equal footing to all potential facility designees, regardless of where they were located. The reason Maharg cannot dispose of its waste at the Jay County landfill has nothing to do with the landfill's Indiana situs. The reason, rather, is that the operator of this particular landfill - unlike the operator of the Fort Wayne landfill - ultimately declined to sign a designation agreement that would have obligated it to collect and remit the $ 5.30 per ton contract fee that Van Wert County insists on receiving from every solid waste facility designee, whether or not the designee is located in Van Wert County.

Under these circumstances, we believe, the county's scheme cannot reasonably be said to discriminate on its face against interstate commerce. Although "a state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 342, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1992)* (quoting *Armco, Inc. v. Hardesty, 467 U.S. 638, 642, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984))*, that is not what Van Wert County is purporting to do. On the face of things, at least, Van Wert County is not engaging in the "simple economic protectionism" condemned by the Supreme Court in Philadelphia.

Maharg goes on to suggest in its opening appellate brief that facial discrimination aside, the restrictions imposed by Van Wert County "may" have had an impermissible discriminatory purpose. In this connection Maharg speculates that the county commissioners might have been motivated by a desire "to assist local haulers to the detriment of the larger haulers such as Maharg."

But Maharg's complaint provides no reason whatever to suppose that the commissioners were acting out of a desire to favor haulers that customarily used one of the seven approved Ohio facilities, only two of which are in Van Wert County. The discriminatory purpose argument looks to us like a red herring.[4]

c

Even if the restrictions imposed by Van Wert County do not have an impermissible discriminatory purpose and do not discriminate on their face against interstate commerce, Maharg contends that the restrictions violate the Commerce Clause because they discriminate against interstate commerce in practical effect. See *Eastern Ky. Resources v. Fiscal Court of Magoffin Co., KY, 127 F.3d 532, 540 (1997)* (citing *Wyoming v. Ohio, 502 U.S. 437, 454-55, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992)):* "A statute can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect."

i

Maharg's "practical effect" argument has two branches. The first is based on the concept - evocative of Kant's categorical imperative - that a state may not adopt legislation the replication of which in other states would have the effect of strangling interstate commerce.[5] See *Healy v. The Beer Institute, Inc., 491 U.S. 324, 336, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989),* where the Supreme Court observed that "the practical effect of the statute must be evaluated not only by

considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." (Emphasis supplied.)

Also pertinent in this connection is C&A Carbone. In that case the Supreme Court struck down a local "flow control ordinance" that required that all nonhazardous solid waste originating within the Town of Clarkstown, New York, be deposited at a transfer station which the town had arranged to have built within its borders under a contract that would ultimately allow the town to purchase the facility for a token sum. The separate opinion of Justice O'Connor, concurring in the conclusion that Clarkstown's flow control ordinance was unconstitutional, returned to the theme sounded in Healy:

> "Over 20 states have enacted statutes authorizing local governments to adopt flow control laws. If the localities in these States impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." *C&A Carbone, 511 U.S. at 406* (O'Connor, J., concurring) (footnote and citations omitted).

If Van Wert County had required that all locally generated waste be taken to a favored in-county facility, refusing to let facilities located elsewhere qualify as approved disposal sites, it is clear that the concerns expressed by Justice O'Connor would have been implicated here. But the county has simply not resorted to the sort of "flow control"

that Justice O'Connor was talking about. The Van Wert County scheme does not automatically prevent locally generated waste from being taken to facilities outside the county (the reader will recall that there are only two in-county solid waste facilities among the eight facilities that sought and obtained Van Wert County's designation as approved sites), and the county appears to be correct in arguing, as it does, that its "fair, open and non-exclusive RFP process assured that any out-of-state facility that wanted access to the District's waste would get it."

If every county in both Indiana and Ohio were to adopt a regulatory scheme identical to Van Wert County's, we have no reason to suppose that the movement of waste between the two states would be eliminated or severely impaired. The practical effect of every county's adopting the Van Wert model might well be an increase in the overall level of waste disposal costs, but we do not believe that this can fairly be equated with the balkanization the Commerce Clause is intended to prevent.

ii

In the second branch of its "practical effect" argument, Maharg contends that the restrictions imposed by Van Wert County deprived Maharg of the competitive advantage it had gained by utilizing the interstate market. Maharg says that it invested in larger trucks than its competitors did, hired more people than they, planned its routes better, and negotiated lower fees with the Jay County landfill. The Commerce Clause, Maharg contends, prevents Van Wert County from "stripping away" the resultant competitive advantage.

Maharg relies for this proposition on *Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 351, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)*, where a North Carolina statute had the effect of requiring western apple growers to bring their marketing practices into line with those of in-state growers. The Supreme Court held the statute to be

unconstitutional, both because of its discriminatory impact on the cost of doing business in North Carolina and because "the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system."

No comparable effect is evident in the case at bar. It is true that the operators of Indiana solid waste facilities would have to incur the costs of collecting and remitting the $ 5.30 per ton surcharge if they wanted to receive waste from Van Wert County, but the operators of Ohio facilities would have to incur precisely the same costs in order to qualify to receive Van Wert County waste. Maharg's investment in the trucks and people that have allegedly enabled it to enjoy economies of scale in hauling waste to Jay County would not appear to have been jeopardized by the surcharge as such. The surcharge may be an annoyance, but it is an equal-opportunity annoyance. It is not a protectionist measure burdening only the operators of foreign facilities.

But is there an impermissible discriminatory effect insofar as Maharg may have suffered a diminution of its alleged competitive advantage over Ohio competitors that have always operated solely intra-state? The county argues that *Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978)*, compels us to answer this question "no."

In Exxon the Supreme Court upheld the constitutionality of a Maryland "divestiture" statute that flatly prohibited a producer or refiner of petroleum products from operating any retail gasoline service station within the state. Major oil companies such as Exxon were thus required to divest themselves of their direct retail gasoline operations in the State of Maryland. There did not happen to be any Maryland-based petroleum producers or refiners - a circumstance that made it plausible, to say the least, for Exxon and other major

oil companies to argue, as they did, that the statute was unconstitutional because its effect was "to protect in-state independent dealers from out-of-state competition." *Exxon, 437 U.S. at 125.*

Plausible though the argument may have been, the Supreme Court rejected it. "The fact that the burden of the divestiture requirements falls solely on interstate companies," the Court concluded, ". . . does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level." Id.

The Exxon Court pointed out that the Maryland statute created no barriers against competition from interstate independent retailers - which is to say that although local Maryland retailers were being protected against competition from the major integrated oil companies, the local retailers were not being protected against competition from a small number of interstate companies that chose to engage solely in gasoline retailing. This circumstance, in the Court's judgment, "fully distinguished" Exxon from cases such as Hunt v. Washington Apple Adver. Comm'n. If any integrated oil companies had been based in Maryland, moreover, they would have been barred from the retail business just as every other producer-refiner was. This was "a most critical factor in Exxon," the Supreme Court subsequently suggested. See *Lewis v. BT Investment Mgrs., Inc., 447 U.S. 27, 42, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980).*

Exxon may not be dispositive of Maharg's "practical effect" argument, but it comes pretty close. At the very least, it seems to us, Exxon shows a willingness on the part of the Supreme Court to engage in some fairly fine slicing and dicing of the practical effects of state legislation in order to avoid the necessity of finding the legislation discriminatory. Exxon also manifests an obvious reluctance to push cases such as Hunt v. Washington Apple Adver. Comm'n to their

logical extremes. And if a "most critical factor" in Exxon was that local producer-refiners would have been barred from the retail trade had any local producer-refiners been in existence, it would seem to be at least as critical, in the case at bar, that Maharg would not have been barred from disposing of Van Wert County waste in Jay County had the operator of the Jay County landfill been willing to sign a designation agreement containing the same terms as the agreements signed by the operators of other landfills.

Maharg submits that the discrimination question must be resolved against Van Wert County because of our decision in *Waste Management, Inc. of Tenn. v. Metropolitan Gov't of Nashville and Davidson Co., 130 F.3d 731 (6th Cir. 1997)* (hereinafter cited as "Metro Nashville"). We find the submission unpersuasive.

At issue in Metro Nashville was a flow control ordinance that, among other things, required all residential solid waste collected within the jurisdiction to be disposed of at a waste-to-energy facility owned by Metro itself. *Id. at 733.* The plaintiff was prohibited from disposing of such waste at a cheaper facility, and the ordinance represented precisely the kind of "simple economic protectionism" that was condemned by the Supreme Court in cases such as Philadelphia, Oregon Waste, and C&A Carbone. We held the ordinance unconstitutional on that basis, Metro not having demonstrated the unavailability of "other means to advance a legitimate local interest." *Metro Nashville, 130 F.3d at 736* (quoting *C&A Carbone, 511 U.S. at 392).*

The Metro Nashville panel acknowledged that the challenged flow control ordinance did not require solid waste of commercial or industrial origin to be sent to the favored facility. *Metro Nashville, 130 F.3d at 736.* The fact that "all residential waste" was required to be sent there, however, was held to be a fatal defect. Id. The plaintiff's ability to send some waste to other facilities, the panel observed, "goes to

the extent of the discrimination, not whether there was discrimination in the first place." Id.

Maharg seizes on the language last quoted as support for an assertion that the constitutionality of Van Wert County's solid waste scheme is not saved by the fact that the county has designated eight sites as approved disposal facilities, not just one. The number of approved facilities, according to Maharg, "only goes to the extent of the discrimination, not whether there was discrimination in the first place." But Maharg ignores the obvious fact that Van Wert County would have approved the Jay County landfill too if the operator of that landfill had been willing to sign the same kind of agreement that was signed by the operators of each of the eight approved facilities. The situation presented in the case at bar, unlike the situation in Metro Nashville, involves no discrimination in the first place.

3

This brings us to the question whether the Van Wert County scheme, if non-discriminatory, should nonetheless be found to run afoul of the Commerce Clause on the ground that it "imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits." *C&A Carbone, 511 U.S. at 390* (citation and internal quotes omitted). We are satisfied that the scheme imposes no such impermissible burden.

The "putative local benefits" of the Van Wert County scheme are obvious from the complaint and its attachments, all of which must be read in the light of the pertinent provisions of the Ohio Revised Code. The scheme was devised as a means of providing for "the safe and sanitary management of [the county's] solid wastes" in accordance with Ohio Rev. Code § 3734.52(A). The first of the series of resolutions mentioned in Part I of this opinion explains that Van Wert County's solid waste management plan, which was approved by the Director of the Ohio Environmental

Protection Agency, "provides for the [county's] implementation of numerous solid waste management activities designed to achieve the State of Ohio's objectives for solid waste recycling, reuse, and minimization." The resolution further explains that the county decided to set the per-ton contract fee at $ 5.30 with a view to covering the costs of "implementing the Plan and enforcing compliance with facility designations." The "safe and sanitary management" of solid waste generated within the county, in other words, is to be conducted on a self-financing basis.

We have no quarrel with Maharg's submission that the operation of the scheme places a burden upon interstate commerce. But neither do we have any reason to doubt that the burden is in line with the cost of ensuring safe and sanitary management of the county's output of solid waste. The facts well pleaded in the complaint fail as a matter of law to support Maharg's claim that the burden is "excessive" in comparison to the supposed local benefits of the scheme.

It is no answer that the existence of the scheme, coupled with Jay County Landfill's refusal to meet the county's conditions for designation as an approved disposal facility, worked a change in the solid waste market structure and ended a flow of interstate commerce from Van Wert County, Ohio, to Jay County, Indiana. The "notion that the Commerce Clause protects the particular structure or methods of operation in a [given] market" is a notion that has been squarely rejected by the Supreme Court. See *Exxon, 437 U.S. at 127.*

B

The first section of the Fourteenth Amendment provides, among other things, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This, the Supreme Court has told us, "is essentially a direction that all persons similarly situated should be treated alike."

Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

Maharg contends that although its situation is similar to that of other solid waste haulers operating in Van Wert County, Maharg has been treated differently from the other haulers. It has been treated differently, Maharg says, because other waste haulers owned or controlled their own transfer stations and/or disposal facilities, and were thus in a position to participate directly in the county's facility designation process. Maharg, in contrast, was "excluded from the [Request for Proposals] process" and was left to the tender mercies of facility owners (Jay County Landfill, e.g.) that could decline to participate on a "whim."

Merely to state such an argument is to come close to refuting it. The process of designating approved facilities must, in the nature of things, be directed to those who have facilities in the first place. Van Wert County did not arbitrarily exclude anyone from the RFP process; on the contrary, as we have seen, the county went out of its way to encourage the widest possible participation. It is not Van Wert County's fault that Maharg did not happen to own a waste disposal facility - that Maharg, in other words, was not situated similarly to haulers that did own such facilities - and the county obviously did not violate Maharg's equal protection rights.

C

Section 1 of the Fourteenth Amendment also provides that no state may "deprive any person of life, liberty, or property, without due process of law." It has come to be understood that this provision has a "substantive" component under which "a state or local legislative measure is judicially voidable on its face if it necessarily compels results in all cases which are 'arbitrary and capricious, bearing no relation to the police power.'" *Sam & Ali, Inc. v. Ohio Dep't of Liquor Control, 158 F.3d 397 (6th Cir. 1998)* (quoting *Eastlake v.*

Forest City Enterprises, Inc., 426 U.S. 668, 676, 49 L. Ed. 2d 132, 96 S. Ct. 2358 (1976)).

The power to provide by legislation for safe and sanitary management of solid waste is obviously a "police power." Van Wert County's waste management scheme bears an obvious relation to this police power. Maharg contends that the county was being "arbitrary and capricious" in the adoption of its waste management scheme, but the contention, as far as we can see, is utterly devoid of merit.

Reasonable people might question the wisdom of the particular method chosen by Van Wert County to protect the health and welfare of its citizens insofar as the management of their solid waste is concerned. It is, nonetheless, "absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "superlegislature to weigh the wisdom of legislation" . . . '" *Exxon, 437 U.S. at 124,* (quoting *Ferguson v. Skrupa, 372 U.S. 726, 731, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963)).* If Maryland did not violate the Due Process Clause by its outright prohibition of the operation of retail gasoline stations by integrated oil companies - and the Supreme Court had "no hesitancy" in rejecting the integrated oil companies' due process challenge to the Maryland statute, see *Exxon, 437 U.S. at 124* - it follows a fortiori that we should have no hesitancy in rejecting Maharg's due process challenge to the Van Wert County scheme. And, in point of fact, we have none.

The district court's judgment of dismissal is AFFIRMED.

Footnotes

[1] There are no sanitary landfills in Van Wert County, but at least two transfer facilities - one owned by the county itself - are located within the county.

[2] Section 343.01(H)(2) provides in part that "upon the request of a person . . . the board of county commissioners of a county district . . . may grant a waiver authorizing the

delivery of all or any portion of the solid wastes generated in a municipal corporation or township to a . . . facility other than the facility designated under section 343.013 . . . ." Maharg acknowledges that it never requested a waiver, but suggests that it would have been a vain act to do so.

[3] Justice White himself read Complete Auto as repudiating more of the earlier understanding than his colleagues may have thought it did: "What we disavowed in Complete Auto," Justice White wrote in Quill, "was not just the formal distinction between 'direct' and 'indirect' taxes on interstate commerce . . . but also the whole notion . . . . that 'interstate commerce is immune from state taxation' . . . ." *Quill, 504 U.S. at 323* (White, J., concurring in part and dissenting in part).

[4] In its reply brief Maharg argues for the first time that Van Wert County was "commandeering the market" in order to compensate for a disappointing revenue flow at the county-owned Van Wert Transfer Station. But if the county had in fact been acting improperly in this regard, we assume that Maharg would have told us so in its opening brief. We note further that if Van Wert County had simply imposed a $ 5.30 per ton tax on the collection of waste within the county, Maharg concedes that it would have had no basis for challenging the tax under the United States Constitution.

[5] Logically, perhaps, this concept has more to do with the "excessive burden" line of analysis than with the "discrimination" line of analysis. In the interest of consistency, however, we shall follow Maharg's taxonomy.

3:99CV7245

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Maharg, Inc.,
Plaintiff,

v.

Van Wert Solid Waste Management District, et al.,
Defendants.

August 6, 1999, Opinion Filed

COUNSEL:
For defendant: Albin Bauer, II, Henry N. Heuerman, Eastman & Smith, Toledo, OH.

For plaintiff: Christopher Sean Habel, Frost & Jacobs, Cincinnati, OH.

JUDGES:
James G. Carr, United States District Judge.

OPINIONBY:
James G. Carr,

OPINION:

Order

This is a case in which plaintiff claims that defendants violated the "dormant" Commerce Clause of the United States Constitution by prohibiting plaintiff from transporting solid waste from Van Wert County, Ohio, to a landfill located in Indiana. Plaintiff further alleges that defendants violated its Equal Protection and Due Process rights under the Fourteenth Amendment. This court has jurisdiction pursuant to *28 U.S.C. § § 1331*, 1343, 1367, 1391.

Pending are defendants' motion to dismiss the Van Wert Solid Waste Management District ("District") (Doc. 8) and defendants' motion to dismiss Van Wert County Commissioners Gary D. Adams, Ava K. Good., and Gary D. Cooper (Doc. 9). Also pending is plaintiff's motion for a preliminary injunction (Doc. 2). For the following reasons, defendants' motions to dismiss shall be granted and plaintiff's motion for a preliminary injunction shall be overruled as moot.

Background

Defendant District is a single county solid waste management district established by the Board of Commissioners of Van Wert County, Ohio, pursuant to § § 343.01 and 3734.52 of the Ohio Revised Code ("O.R.C."). (Doc. 1 at 2-3). The District's purpose, pursuant to O.R.C. § 374.52(A), is to provide for safe and sanitary handling of all solid waste generated within the District's boundaries through implementation and maintenance of solid waste disposal, recycling, and minimization programs. Plaintiff collects solid waste generated within the District and transports it to facilities located outside the District for disposal, including the Jay County landfill in Portland, Indiana. (Doc. 1 at 4, 14). Waste haulers, pursuant to O.R.C. § § 343.01(G)(1) through (G)(4), and 343.01(I)(1) and (I)(2), are subject to the rules and requirements of the districts in which they operate.

In this case, plaintiff argues that the District violated its constitutional rights by failing to authorize plaintiff's preferred landfill, Waste Management's Jay County landfill in Indiana, as a "designated" (i.e., authorized) site. A "designated" site is one which is legally able to receive solid waste generated within the District's boundaries (i.e., Van Wert County). The District designated eight sites through a procedure known as an open request for proposal (RFP). (Doc. 1 at 17). During the RFP process, landfills from Ohio and Indiana were given the chance to enter into an agreement with the District. (Id). Of the eight facilities entering into an agreement with the District, one is located in Fort Wayne, Indiana, and the others are located in Ohio. The District invited Jay County landfill to submit a proposal for designation, but Jay County, for an unspecified reason, informed the District that it did not want to enter into a designation agreement, (Doc. 1 at 21). Thus, the Jay County landfill was not one of the eight facilities designated by the District to receive waste from Van Wert County. (Doc 1 at 25).

Because the Jay County landfill is not a "designated" site, it is prohibited from receiving, from any hauler, waste generated within the District. (Doc 1 at 29). All waste generated in Van Wert County must be delivered to one of the eight designated facilities, and the hauler of the waste can choose any one of the designated sites. Id. Plaintiff, who traditionally delivered all the waste that it collected in Van Wert County to the Jay County landfill, wishes to continue this practice for cost reasons. (Doc. 1 at 30). Plaintiff asserts that if it is not allowed to use the Jay County landfill, increased disposal costs may have to be passed through to its customers. n1 Id. Plaintiff claims that the adverse impact on its business violates the Commerce Clause, Equal Protection Clause, and its Due Process rights.

Also at issue in this case is whether defendants Adams, Good, and Cooper can be held individually liable for their

actions as County Commissioners. As County Commissioners of Van Wert County, defendants, pursuant to O.R.C. § 343.01, are charged with operating the solid waste management district in their county. Pursuant to O.R.C. § 341.01(G), the Board of County Commissioners of a county district is responsible for adopting and enforcing the district's rules regarding disposal of solid waste. This is exactly what the Commissioners did in this case. Plaintiff claims that they should be held individually liable for their actions in adopting and enforcing the District's rules.

Discussion

A Rule 12(b)(6) motion tests whether a cognizable claim has been pleaded in the complaint. *Shield v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988).* Under Rule 12(b)(6), all well-pleaded material factual allegations of the plaintiff must be taken as true and construed in a light most favorable to the plaintiff. See *Morgan v. Church's Fried Chicken. 829 F.2d 10, 12 (6th Cir. 1987).* The court need not accept, however, legal conclusions, unwarranted factual inferences, or vague or conclussary allegations. See *Id at 10.* The motion should be granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law. See *U.S. v. Moriarty, 8 F.3d 329, 332 (6th Cir. 1993).* A complaint may be dismissed if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. See *Morgan, 829 F.2d at 12.*

A. "Dormant" Commerce Clause Claim

The United States Constitution expressly authorizes Congress to "regulate Commerce with Foreign nations, and among the several states," U.S. Const. art. I § 8, cl. 3, and "the 'negative' or 'dormant' aspect of the Commerce Clause prohibits the States from advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'" *Fort Gratiot Sanitary Landfill,*

Inc. v Michigan Dep't of Natural Resources, 504 U.S. 353, 359, 119 L. Ed. 2d 139, 112 S. Ct. 2019 (1992). The dormant Commerce Clause also limits the actions of municipalities such as defendants, whose actions may "burden interstate commerce or impede its free flow." *C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 389, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994).*

When deciding if an ordinance violates the dormant Commerce Clause, a court must first "determine whether [the law] 'regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.'" *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality of Oregon, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994)* (quoting *Hughes v. Oklahoma, 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979)).* A law that discriminates against interstate commerce treats in-state and out-of-state interests differently, benefitting the former and burdening the later. See *Oregon Waste, 511 U.S. at 99.*

If a law does, in fact, discriminate against interstate commerce, it is "virtually per se invalid," id., unless "the municipality can demonstrate under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone, 511 U.S. at 392.* On the other hand, "nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. '" *Oregon Waste, 511 U.S. at 99* (quoting *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)).* An application of the latter test is appropriate based on the facts of this case, because the regulation imposed by the defendants is nondiscriminatory.

The out-of-state location of plaintiff's landfill of choice had nothing to do with its failure to be designated. Defendants gave the Jay County landfill the same opportunity to acquire the right to receive Van Wert County waste as they

gave in-state landfills. The RFP process for the Jay County Landfill was the same as the RFP process for the in-state landfills. Some of the in-state landfills decided not to contract with the District. Some of the out-of-state landfills decided not to contract with the District. Discrimination by the District had nothing to do with these decisions. Whether located in Ohio or Indiana, each landfill made a business decision regarding designation by the defendants. The regulations imposed by the defendants were, on their face, nondiscriminatory and their effects on out-of-state commerce, if any, are merely incidental.

Thus, the District's actions could violate the "dormant" Commerce Clause only if the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike, 397 U.S. at 137.* The party challenging the ordinance must prove that the burdens placed on interstate commerce outweigh the benefits accruing to interstate commerce. *USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1282 (2nd Cir. 1995).* Where, as here, the ordinance is nondiscriminatory, the enactment enjoys a presumption of constitutionality. This presumption can be overcome only by a clear showing that the national interest in uniformity or free commerce outweighs the state benefit. See generally *Pike, 397 U.S. at 137-138, USA Recycling, 66 F.3d at 1287.*

The burden in this case is not "clearly excessive." In fact, it is debatable whether there exists any incidental burden on interstate commerce as a whole. Clearly, plaintiff will be unable to transport waste to his preferred landfill in Indiana. However, there is another landfill in Fort Wayne, Indiana, to which plaintiff can take its waste. Furthermore, the "incidental" nature of burdens to which the Pike court alludes appears to be related to interstate commerce on a larger scale. Minor effects on interstate commerce are inevitable with any form of regulation by the state which relates to commerce of any kind. Here, plaintiff appears to be the only party who is

potentially affected by the decision of the defendant with regards to interstate commerce. In any event, any incidental burden on interstate commerce is unrelated to discrimination against nonresidents, and this is the fatal flaw of plaintiff's "dormant" Commerce Clause argument. Plaintiff's Commerce Clause claim shall be dismissed.

B. Equal Protection and Due Process Claims

Equal Protection and Due Process challenges to local economic and social legislation are subject to a "rational relationship" review. *Borman's Inc. v. Michigan Property & Casualty Guaranty Ass'n, 925 F.2d 160, 162 (6th Cir. 1991).* The scrutiny under Equal Protection and Due Process challenges to state "economic" legislation is extremely low. Generally, the contested law will only be stricken if the classification is "purely arbitrary." See *Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 55 L. Ed. 369, 31 S. Ct. 337 (1911).* Here, the allegations and exhibits in plaintiff's complaint demonstrate that defendants facility designations were related to legitimate interests. These interests include more effectively monitoring the facilities and methods being used to manage solid waste generated within the District and securing solid waste fees for the District to defray costs derived from implementing the District's solid waste management plan. (Doc. 1, Exhibit B and I). Thus, plaintiff's Substantive Due Process and Equal Protection claims shall be dismissed because there is a "rational relationship" between the defendants' actions and objectives.

C. Commissioners' Individual Liability

The Ohio Attorney General has concluded that a solid waste management district that comprises only one county (as is the case here), operates through the board of county commissioners of that county. Ohio Att'y Gen. Op. No. 92-060 (1992). The board of county commissioners in court is subject to suit in court. O.R.C. § 305.12. However, it has long been held in Ohio that county commissioners who are

acting in their official capacities in good faith, and in honest discharge of their official duty, cannot be held personally liable for damages. See *Thomas v. Wilton 40 Ohio St. 516 (1884).*

Plaintiff fails to allege that defendants acted outside the scope of their capacity as directors of the district. Defendants, acting as Directors of the Van Wert Solid Waste Management District, are equivalent to defendants acting as County Commissioners of Van Wert County. Thus defendants were acting in their official capacities as county commissioners and cannot be held personally liable for damages. Furthermore, plaintiff fails to raise any bad faith allegations. Therefore, plaintiff improperly named defendants Adams, Good, and Cooper in this lawsuit.

D. Preliminary Injunction

Plaintiff's request for a preliminary injunction shall be overruled as moot.

Conclusion

For the foregoing reasons, it is hereby

ORDERED THAT

1. Defendants' motion to dismiss the District (Doc. 8) shall be, and hereby is, granted.

2. Defendants' motion to dismiss Adams, Good, and Copper (Doc.9) shall be, and hereby is, granted.

3. Plaintiff's motion for a preliminary injunction (Doc.2) shall be, and hereby is, denied.

So ordered.

/s/

James G. Carr

United States District Judge

Footnotes

[1] Plaintiff will have to pay the District's $ 5.30 per ton fee if it is required to use the District's designated facilities, and the plaintiff fears the loss of customers if it passes this fee on to them. (Doc 1 at 30). However, every other hauler in the district, pursuant to O.R.C. § 343.01(I)(2), is subject to the same fee.

99-4035

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MAHARG, INC.,
Plaintiff-Appellant,

v.

VAN WERT SOLID WASTE MANAGEMENT DISTRICT, ET AL., Defendants-Appellees.

2001 U.S. App. LEXIS 16102

July 12, 2001, Filed

JUDGES:

BEFORE: MERRITT, NELSON, and BATCHELDER, Circuit Judges.

OPINION:

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Supreme Court, U.S.
FILED
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No. 01-615

In The

Supreme Court of the United States

MAHARG, INC.,

Petitioner,

versus

VAN WERT SOLID WASTE MANAGEMENT DISTRICT; GARY D. ADAMS, Chairman of the Board Van Wert Solid Waste Management District; AVA K. GOOD, Director of Van Wert Solid Waste Management District; GARY D. COOPER, Director of Van Wert Solid Waste Management District,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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32pp

QUESTION PRESENTED

Should the Supreme Court review the Sixth Circuit's decision that the dormant Commerce Clause is not violated by a county regulation that allows solid waste generated within the county to be delivered to any of eight solid waste facilities that were designated by the county using an open, fair, and non-exclusive contracting process that provided all potentially interested facilities located inside or outside the state with an equal opportunity to receive the county's waste?

LIST OF PARTIES

The list of parties in the Petition is incorporated by reference herein subject to the following clarifications. Respondent Van Wert Solid Waste Management District is a solid waste management district established and maintained by the Board of Commissioners of Van Wert County, Ohio. Respondents Gary D. Adams and Ava K. Good are elected members of the Board of Commissioners of Van Wert County, Ohio. Respondent Gary D. Cooper is a former elected member of the Board of Commissioners of Van Wert County, Ohio, whose term of office expired on January 3, 2001, at which time Mr. Cooper was replaced by newly elected Commissioner Clair A. Dudgeon.

CORPORATE DISCLOSURE STATEMENT

Respondents are a public agency and its officers. There are no parent, subsidiary or affiliate companies to be listed pursuant to Rule 29.6.

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All relevant opinions are included in the Appendix to the Petition.

JURISDICTIONAL STATEMENT

Petitioner prays for exercise of this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Court should decline to exercise its jurisdiction. The Sixth Circuit's decision affirming the District Court's dismissal of Maharg's action pursuant to Fed. R. Civ. P. 12(b)(6), does not conflict with the decision of another United States Court of Appeals, nor does it decide an important federal question in a way that conflicts with relevant decisions of this Court or of a state court of last resort.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions listed in Petitioner's brief, the following statutory provisions are also involved herein.

Relevant Portions of Ohio Revised Code § 343.01(I)(2)

> If the board of county commissioners of a county district or board of directors of a joint district has established facility designations

> under section 343.013, 343.014, or 343.015 of the Revised Code, . . . no person, municipal corporation, township, or other political subdivision shall deliver, or cause the delivery of, any solid wastes generated within a county or joint district to any solid waste transfer, disposal, recycling, or resource recovery facility other than the facility designated under section 343.013, 343.014, or 343.015 of the Revised Code. . . . Upon the request of a person or the legislative authority of a municipal corporation or township, the board of county commissioners of a county district or board of directors of a joint district may grant a waiver authorizing the delivery of all or any portion of the solid wastes generated in a municipal corporation or township to a solid waste transfer, disposal, recycling, or resource recovery facility other than the facility designated under section 343.013, 343.014, or 343.015 of the Revised Code. . . .

STATEMENT OF THE CASE

This case involves claims by Petitioner, Maharg, Inc., an Ohio corporation engaged in the business of solid waste collection and disposal, alleging that the waste processing rules of an Ohio solid waste management district violate the dormant Commerce Clause. The pertinent facts in this case are based on the allegations and exhibits contained in the verified complaint and motion

for preliminary injunction filed by Maharg in the United States District Court for the Northern District of Ohio.[1]

Van Wert County, Ohio, is located on the western border of Ohio, approximately 30 miles away from Fort Wayne, Indiana. The county is governed by an elected Board of Commissioners (the "Board") consisting of three members, who are named as Respondents herein. Respondent Van Wert Solid Waste Management District (the "District") is a single county solid waste management district established and maintained by the Board pursuant to Ohio Rev. Code §§ 343.01 et seq. and Ohio Rev. Code § 3734.52. As provided in Ohio Rev. Code §§ 3734.52(A) and 3734.53(A), the District's purpose is to: (1) provide for the safe and sanitary management of solid waste generated within the District; and (2) prepare and implement a solid waste management plan that certifies the availability of solid waste facility capacity to meet the District's needs for at least ten years, and demonstrates compliance with the solid waste recycling, reuse, and minimization goals of the State of Ohio's solid waste management plan.

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[1] Maharg's verified complaint provided a complete record of the material facts in this case. The complaint had seventeen attached exhibits, including all of the relevant resolutions adopted by the District, the District's first and second requests for proposals, and the District's solid waste management plan. Maharg itself represented to the District Court that the complaint "set forth the relevant facts in substantial detail." Maharg's brief on appeal to the Sixth Circuit stated that, "The facts of this case are relatively undisputed." Thus, no discovery was necessary to present fully developed facts and arguments to the District Court for a decision pursuant to Fed. R. Civ. P. 12(b)(6).

Pursuant to its solid waste management plan, the District provides its residents with solid waste disposal services at the District-owned transfer station located in the City of Van Wert. The Board employs Fort Wayne-based National Serv-All, Inc. to operate the District's transfer station. The plan further requires the District to use its own vehicles and employees to provide weekly collection and processing of recyclable materials that residents place at the street curb.[2] The District also operates a large composting facility to process a substantial tonnage of yard waste into beneficial mulch and compost, thereby conserving valuable landfill space for the disposal of non-recyclable solid waste.

Maharg collects solid waste generated within the District and transports it to solid waste facilities for processing and disposal. The Jay County landfill located in Portland, Indiana, is a subsidiary of Waste Management, Inc., and is one of the facilities that Maharg prefers to use for the disposal of solid waste collected by Maharg in Van Wert County.

On August 6, 1998, the Board, acting pursuant to Ohio Rev. Code § 343.014, adopted a resolution of intent to designate sanitary landfills and transfer stations where solid waste generated within the District must be

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[2] Attached to Maharg's complaint as Exhibit A is a portion of the District's solid waste management plan, as approved by the Director of Ohio EPA on February 19, 1998. A complete copy of the District's plan is contained in the record as Exhibit 1 to Defendant's Motion to Dismiss.

delivered for disposal.[3] The resolution identified the Board's reasons for designating facilities, including: (a) assuring adequate solid waste facility capacity to handle all of the waste disposal needs of the District; (b) providing adequate funds to implement the programs contained in the District's solid waste management plan; and (c) improving the District's ability to monitor and oversee the manner in which solid waste generated within the District is collected, stored, transported, processed, recycled or disposed. (Complaint, Exhibits B, I, and M). The Board's August 6, 1998 resolution also approved a Request for Proposals (RFP) which described the District's intent to designate any landfill or transfer station that requested to receive solid waste generated within the District and agreed to execute a contract that required each designated facility to collect a fee of $5.30 per ton on the District's solid waste delivered to the facility. The Board exceeded the notice requirements in Ohio Rev. Code § 343.014 by publishing legal notices of the Board's intent to designate in newspapers in Van Wert, Ohio, and in Fort Wayne, Indiana.

The District's RFP was provided to eleven solid waste facilities, including two landfills in Indiana. Four facilities submitted a request to be designated pursuant to the RFP. The responding facilities included: National Serv-All's landfill in Fort Wayne, Indiana; Waste

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[3] A transfer station is a solid waste facility that receives waste from off-site generators and transfers the waste into larger trucks for transportation to a licensed waste disposal facility, such as a sanitary landfill. Ohio Admin. Code § 3745-27-01(C)(13).

Management's Jay County landfill in Portland, Indiana; another Waste Management landfill in Toledo, Ohio; and the District's transfer station in Van Wert, Ohio, which is operated by National Serv-All. The Board adopted a resolution on September 8, 1998, designating all four of the facilities that responded to the RFP. Pursuant to Ohio Rev. Code § 343.014(G), the Board's designations were supposed to go into effect sixty (60) days after the September 8th resolution.

One day before the Board's designations were to go into effect, the Jay County landfill notified the Board that it would not enter into the District's form designation agreement, and that it would not accept any designation by the Board even if the District modified the terms of its designation agreement or conducted a new RFP process. (Complaint, Exhibit H).[4] With the Jay County landfill refusing to be designated, the Board was concerned that proceeding with designation of the remaining three facilities would concentrate too much of the local waste disposal market in the hands of National Serv-All. Therefore, the Board decided to conduct a new RFP process to increase the number and diversity of designated facilities. (Complaint, Exhibit I).

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[4] Petitioner's brief at 16 is incorrect in its assertion that the District's designation agreement was non-negotiable. The RFP unambiguously stated that the District reserved the right to negotiate the terms of the form designation agreement with the facilities interested in being designated. (Complaint, Exhibit C, pp. 2, 8, 16, and Exhibit K, pp. 2, 8, 15).

The Board's second RFP emphasized that the Board would designate each facility that responded regardless of pricing, as long as the responding facility had the proper environmental permits as determined by their home state, and the facility agreed to execute the District's form designation agreement which required the facility to collect and remit a $5.30 per ton fee on each ton of the District's waste delivered to the facility. Eight facilities responded to the Board's second RFP, including: National Serv-All's landfill in Fort Wayne; Waste Management's landfill in Toledo; Waste Management's transfer station in Lima, Ohio; Allied Waste's landfill in Celina, Ohio; another Allied Waste landfill in Carey, Ohio; the Defiance County-owned landfill in Defiance, Ohio; the District's transfer station in Van Wert, Ohio, which is operated by National Serv-All; and a transfer station that Young's Trash Service proposed to build in Van Wert. All of the facilities that responded to the second RFP were designated by the Board on February 18, 1999. (Complaint, Exhibit O).

The District mailed a copy of the second RFP to Waste Management's Jay County landfill in Portland, Indiana, and would have designated that facility based on the same terms and conditions as the eight designated facilities if the Jay County landfill had responded to the RFP. The Jay County landfill made a business decision that it would not respond to the second RFP and, consequently, would no longer receive the District's waste.

The Board's designations of the eight facilities that responded to the second RFP went into effect on April 20, 1999. After that date, all solid waste generated within the District had to be delivered to one of the eight designated

facilities unless the Board grants a waiver allowing waste to be delivered to a non-designated facility. Ohio Rev. Code § 343.01(I)(2). Maharg cannot deliver solid waste generated within the District to the Jay County landfill because that facility decided not to be designated. Maharg has not requested the Board to grant a waiver so that Maharg may deliver the District's waste to a non-designated facility such as the Jay County landfill. (Maharg's Reply Brief of Appellant, at 4).

In dismissing Maharg's complaint pursuant to Fed. R. Civ. P. 12(b)(6), the District Court held that the District's solid waste rules neither facially nor effectively discriminate against interstate commerce. Every landfill and transfer station that was interested in receiving the District's waste had the same opportunity to be designated, regardless of whether the facility was located inside or outside of Ohio. The court similarly concluded that Maharg could not sustain its claims under the undue burden test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because although Maharg could no longer take the District's waste to the Jay County landfill, Maharg and every other waste hauler was free to take the District's waste to National Serv-All's landfill in Fort Wayne, Indiana, or any of the designated facilities in Ohio. The burden on interstate commerce, if any, from Maharg's inability to use the Jay County landfill, was the result of the Jay County landfill's refusal to be designated, rather than the District's nondiscriminatory regulation.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's dismissal of

Maharg's complaint. The Sixth Circuit held that the District's regulation neither facially nor effectively discriminates against the flow of the District's waste to out-of-state facilities. The Sixth Circuit further determined that the District's regulation is not clearly excessive in view of the District's purposes of implementing the programs in its solid waste management plan, and improving its ability to monitor solid waste management activities in the District. The Sixth Circuit concluded that Maharg's claim under the dormant Commerce Clause was at odds with the Supreme Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), because the effects on Maharg's hauling operations were the result of the Jay County landfill's decision not to be designated by the District.

REASONS FOR DENYING THE WRIT

In *West Lynn Creamery v. Healy*, 512 U.S. 186, 201-202 (1994), the Court cautioned that whatever the name, label or catchword that is ascribed to a statute challenged as violating the dormant Commerce Clause, the ultimate determination of whether the statute discriminates against interstate commerce depends upon a "sensitive, case-by-case analysis of purposes and effects." In this case, Petitioner maintains that every local rule requiring waste to be processed or disposed at one or more specified facilities is "flow control," and that all "flow control" violates the dormant Commerce Clause pursuant to the Court's decision in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). As the discussion below demonstrates, however, the District's facility designations at

issue herein operate very differently from the "flow control" ordinance in *Carbone*, and a careful analysis of the practical effects of the District's regulation reveals that it is neither discriminatory nor excessive.

In addition, both Congress and this Court have recognized the traditional role of local governments in regulating solid waste collection and disposal. *See, e.g., California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905); Resource Recovery Conservation and Recovery Act, § 1002(a)(4) (codified at 42 U.S.C. § 6901(a)(4) (1988)) (congressional finding that the "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies" supplemented by federal financial aid and technical assistance). Because the District's waste disposal regulations do not "seriously interfere" with the interstate market in waste processing and disposal, the District's regulation is permissible. *See South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 187-188 (1938). Petitioner's brief fails to address the Sixth Circuit's view that Maharg's alleged injuries were peculiar to its waste hauling operations due to Maharg's preference for using the Jay County landfill, and not as the result of any discrimination or undue burden on interstate commerce by the District's regulation. The Sixth Circuit correctly held there is no dormant Commerce Clause violation in such a case pursuant to *Exxon Corp., supra*. The Sixth Circuit's decision below is in line with the prior dormant Commerce Clause decisions of this Court, as well as the decisions of other circuits that have considered regulations similar to the District's

herein. Petitioner's claims do not present a significant constitutional issue that demands the attention of this Court.

A. The Sixth Circuit's Decision Is Consistent With Prior Decisions Of This Court Regarding Local Regulation Of Solid Waste.

Since 1978, this Court has considered five cases involving local solid waste regulations that were challenged as violating the dormant Commerce Clause. *See C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994); *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). This line of cases has defined an analytical framework that is applied to determine the constitutionality of a local waste regulation: first, whether the regulation discriminates against interstate commerce; and second, whether the regulation imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits. *Carbone*, 511 U.S. at 390.

1. The Decision Below Is Consistent With The Court's Framework For Analyzing Whether There Is Discrimination Against Interstate Commerce.

The Sixth Circuit held that the District's designations did not facially, purposefully, or effectively discriminate against interstate commerce because the District used an

open, fair, and non-exclusive RFP process that provided every interested facility with the same opportunity to receive the District's waste regardless of whether the facility was located inside or outside of Ohio. Unlike the solid waste regulations in *Carbone* and *Philadelphia*, the District's designations neither restrict the processing and disposal of the District's waste to a favored facility, nor prevent the flow of waste to a facility simply because it is located in a different state than where the waste is generated.

Likewise, there are fundamental differences between the District's facility designations herein and the statute that was challenged in *Fort Gratiot*. At issue in *Fort Gratiot* was a Michigan law that created a blanket prohibition against the acceptance of out-of-state waste at a waste disposal facility in Michigan unless the acceptance of such waste was explicitly authorized by the county in which the disposal facility was located. St. Clair County, Michigan, did not authorize the receipt of out-of-state waste, and denied the petitioner's application to receive such waste at its landfill in the county. *Fort Gratiot*, 504 U.S. at 355-357. The Court determined that although Michigan's statute allowed the import of out-of-state waste in theory, St. Clair County actually prohibited such imports in fact in order to protect local waste producers from competition with out-of-state producers for local landfill space. *Id.* at 361. In contrast, the District's designation program herein was not only designed to allow waste to be delivered outside Ohio, the District's implementation of the program ensures that any out-of-state facility that wants the District's waste, such as National Serve-All's landfill in Fort Wayne, will actually receive

the waste. Accordingly, the Sixth Circuit's decision below is not in conflict with *Carbone*, *Fort Gratiot*, or *Philadelphia*, which are the cases principally relied upon by Petitioner regarding impermissible discriminatory effects.

Petitioner fails to articulate a coherent theory which explains how the District's actions are discriminatory. The Petition contends, without any support, that the District's rules favor large waste companies at the *expense of small independent haulers* such as Maharg, whereas in the Sixth Circuit, Petitioner claimed that the District's policies were motivated by a desire "to assist local haulers to the *detriment of the larger haulers* such as Maharg." *Compare* Petition at 13 *with* Petition at 11a. Maharg's contradictory positions demonstrate the evenhandedness of the District's regulations. In reality, if the District had been motivated by favoritism, its regulations would have required all of the District's waste to go to the District-owned transfer station. *Carbone* made it clear, however, that such a preference is prohibited by the dormant Commerce Clause. Accordingly, the District designed a non-discriminatory facility designation system that eschewed any preference or favoritism for any individual or class of haulers or waste facilities.

2. The Decision Below Is Consistent With The Court's Framework For Analyzing Whether There Is An Undue Burden On Interstate Commerce.

In *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, n. 12 (1997), the Court noted that most of the cases that have purported to apply the undue burden test first enunciated

in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), have "arguably turned in whole or in part on the discriminatory character of the challenged state regulations." The Court added that "a small number of our cases have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation." *General Motors, supra* (citing *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945)). The Court in *General Motors* concluded that the Petitioner in that case "could not support *any claim* of undue burden" because the Ohio statute challenged therein was nondiscriminatory and did not give rise to conflicting regulations. *Id.* (emphasis added). The Sixth Circuit's decision below similarly determined that the District's rules were nondiscriminatory, and presented no risk that conflicting regulations would eliminate or severely impair the flow of waste between states if all counties designated facilities using a fair, open, and non-exclusive RFP that provides every out-of-state facility an equal opportunity to receive the counties' waste, as the District's RFP did in this case. (Petition at 10a-13a). The Sixth Circuit's conclusion that the District did not unduly burden interstate commerce is consistent with the explanation of the *Pike* analysis in *General Motors*.

In addition, the Sixth Circuit determined that the District's facility designations resulted in a minimal burden, if any, on interstate commerce. Nothing in the

District's RFP prevented any out-of-state facility from being designated, and the District did designate National Serv-All's landfill in Fort Wayne, which was the only out-of-state facility that said it wanted to receive the District's waste. Therefore, every hauler, including Maharg, is able to take as much of the District's waste as it pleases across the state line to the Fort Wayne landfill. The Sixth Circuit concluded that the District's facility designation program is in line with the District's purposes of improving its monitoring and measurement of solid waste management activities in the District, implementing the District's solid waste management plan on a self-funding basis, and maximizing the number of facilities that provide disposal services for waste generated within the District. (Petition at 18a).[5] The Sixth Circuit's conclusion is a straightforward application of the Court's undue burden analysis.

3. The Decision Below Is Consistent With The Court's Prior Holdings That In The Absence Of Congressional Legislation, A Local Government May Implement A Regulation That Is Local In Character And Effect, And Does Not Discriminate Or Excessively Burden Interstate Commerce.

Petitioner's position that the District's regulation is impermissible because of the need for "comprehensive

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[5] The facility designations were instituted to comply with the District's obligations under Ohio law to implement strategies that assure at least 10 years of adequate disposal capacity, and to recycle, reduce, and minimize the volume of solid waste generated within the District that requires landfill disposal. Ohio Rev. Code §§ 3734.52 and 3734.53 (Anderson 1999); Ohio Admin. Code § 3745-27-90 (2001).

national regulation" of waste collection and disposal, is contrary to the pronouncements of Congress and this Court. Congress views solid waste management problems as local issues that should be dealt with by local governmental agencies. *See* 42 U.S.C. § 6901(a)(4) (1988). This Court has recognized that the primary responsibility for solving waste collection and disposal problems is one that has traditionally been shouldered by local governments. *See, e.g., California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905); *see also Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 653 N.E.2d 646, 653 (1995) (relying upon "long-established" precedent that cities and counties may designate waste disposal facilities as a reason why *Carbone* did not render moot a challenge against a solid waste district's designation agreement). Consequently, there is not, nor is there likely to be, a single universal approach to solving the difficulties involved in the collection, transportation, storage, transfer, processing, recycling and disposal of locally generated solid waste. *California Reduction*, 199 U.S. at 320-21. These precedents dispel Petitioner's contention that there is a compelling need for national uniformity in the regulation of solid waste collection and disposal.

The traditional reliance on local governments to deal with waste collection and disposal issues, and the diversity of the solutions that may be implemented, puts the regulation of solid waste collection and disposal squarely within the "residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to

some extent, regulate it," in the absence of conflicting legislation by Congress. *Southern Pacific*, 325 U.S. at 767; *see also South Carolina Highway Dep't*, 303 U.S. at 185. The Petitioner does not dispute that Congress has not enacted legislation that conflicts with the States' traditional police powers to provide by legislation for the safe and sanitary management of solid waste. In light of Congress' finding in 42 U.S.C. § 6901(a)(4) that states and local governments should take the lead in addressing solid waste issues, it is untenable to infer as the Petitioner does, that Congress' failure to enact national flow control legislation is intended as a prohibition against local solid waste management initiatives such as the District's facility agreements and waste fees. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) ("Nonaction by Congress is not often a useful guide"); *South Carolina Highway Dep't*, 303 U.S. at 187 (Congress' bare possession of the power to regulate interstate commerce affords no occasion for saying that the states must conform to standards which Congress could, but has not adopted). Because the collection and disposal of waste is largely a matter of local concern, and Congress encourages the states and local governments to exercise primary responsibility for addressing solid waste management issues, it is more likely that Congress simply does not perceive any necessity for enacting national flow control legislation.

Based on these precedents, Petitioner's reliance on *Healy v. The Beer Inst.*, 491 U.S. 324 (1989) is misplaced. *Healy* invalidated a pricing regulation that was not local in character or effect, and directly controlled commerce *"occurring wholly outside* of the State's boundaries." *Id.* at

336 (emphasis added). The District's regulation and fees apply exclusively to solid waste generated within the District. Moreover, the regulated waste is collected by haulers while they are in the District. It is these haulers operating within the District that pay the $5.30 per ton fee to the designated facilities, which in turn remit the collected fees to the District. Unlike the pricing statutes at issue in *Healy*, the facility designations adopted by the District are indifferent to whether the haulers and facilities that serve the District's waste needs are based inside or outside Ohio, and there is nothing in the District's regulation that requires either an in-state or out-of-state facility to change the way it operates in order to comply with the District's designations. Each facility was free to decide whether it wanted to provide disposal services for the District's waste. Every facility that wanted the District's waste was designated, and receives and disposes of the District's waste in the same way that it did before the District's designations. The only effect alleged by Maharg is that the Jay County landfill was one of the facilities that decided to discontinue receiving the District's waste. The Jay County landfill dictated this result, however, rather than the District's rules.

4. The Decision Below Follows The Court's Prior Holdings That A Company's Preferred Methods Of Operation Are Not Protected By The Dormant Commerce Clause.

The Sixth Circuit's decision is also consistent with this Court's analysis of the dormant Commerce Clause in *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978). In

Exxon, the Court determined that the dormant Commerce Clause does not "protect the particular structure or methods of operation in a given market." *Id.* at 127. Maharg's criticism of the District's regulation is that landfill owners and transfer stations were given the opportunity to decide whether they wanted to receive the District's waste for disposal or processing, and haulers such as Maharg had to live with the facilities' decisions.[6] While eight facilities, including one in Indiana, agreed to take the District's waste, the Jay County landfill that Maharg preferred to use made a business decision not to take the District's waste. Maharg's position is that the dormant Commerce Clause gives Maharg the right to impose the structure of its hauling operations on the District notwithstanding the Jay County landfill's refusal to contract with the District. *Exxon* establishes that

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[6] The Sixth Circuit answered Maharg's criticism, in part, by stating that it is not the District's fault that Maharg does not own or operate a landfill or transfer station. (Petition at 19a). In other words, it is one of the inherent risks of being an independent hauler that a landfill may decide that it does not need or want a particular independent hauler's business. Young's Trash Service, which is another independent hauler that competes with Maharg within the District, protected itself from this risk by proposing to establish a small transfer station of its own, and having the proposed transfer station designated by the District. (Complaint, Exhibit O). While Maharg could have used the same strategy as Young's, it does not need to. The District's form designation agreement requires each of the eight designated facilities to accept deliveries of the District's waste from any hauler, including Maharg. (Complaint, Exhibit K). Maharg apparently does not appreciate that the District's facility designations protects it and other independent haulers from being denied access to landfills and transfer stations that take the District's waste.

Maharg does not have that right. Moreover, Maharg has not exercised the opportunity to request a waiver from the Board pursuant to Ohio Rev. Code § 343.01(I)(2) (Anderson 1998), that would potentially allow Maharg to deliver the District's waste to non-designated facilities. The Sixth Circuit correctly decided that based on *Exxon*, Maharg's complaint fails to state a valid claim under the dormant Commerce Clause.

B. The Sixth Circuit's Decision Is Consistent With The Decisions Of The Other Circuits In Dormant Commerce Clause Challenges Against Local Solid Waste Regulations.

The other circuits that have considered a local government's use of a fair and open process to designate waste disposal providers have concluded that such designations do not offend the dormant Commerce Clause if all interested service providers have an equal opportunity to be designated. *See Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 802 (3rd Cir. 1995). In both of these cases, the challenged regulation was intended to result in the open, fair, and competitive selection of one contractor to be the exclusive provider of waste disposal services within the designating entity's jurisdiction. The District's process in this case was designed to result in non-exclusive facility designations, and is thus far less restrictive than the designation processes in *Houlton* or *Harvey & Harvey*. The Sixth Circuit's approval of the District's designations herein maintains unanimity among the circuits that have considered the

constitutionality of open and fair facility designation processes since *Carbone*.

The other cases cited in the Petitioner's brief at 7-8, n. 3, and 19, do not involve regulations that are similar to the District's herein. These cases can be divided into three categories.

The first line of cases involves flow control ordinances requiring all of a community's waste to be delivered to a single, preferred, local facility, similar to the ordinance at issue in *Carbone*. The courts have struck down these ordinances as *per se* discriminatory. *See, e.g., Waste Mgmt. v. Metro Gov't of Nashville and Davidson County*, 130 F.3d 731, 736 (6th Cir. 1997); *Atlantic Coast Demolition & Recycling v. Bd. of Chosen Freeholders*, 112 F.3d 652, 663 (3rd Cir. 1997); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514 (2nd Cir. 1995).

The second line of cases deals with so-called "intrastate" flow control regulations, in which waste is required to go to a single, preferred, local facility unless the waste is taken outside the state for disposal or processing. *See, e.g., On The Green Apts. L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1241-1242 (9th Cir. 2001); *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069 (8th Cir. 2000); *United Waste Sys. of Iowa, Inc. v. Wilson*, 189 F.3d 762, 766 (8th Cir. 1999); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1387 (8th Cir. 1997). The courts have held that these intrastate regulations do not discriminate against interstate commerce. The intrastate flow control regulations have received greater scrutiny under the *Pike* balancing test, however, and in *U&I Sanitation, supra*, at 1072, the court held that the intrastate flow

control regulation created an excessive burden on interstate commerce because it caused a substantial reduction in the volume of recyclable materials entering the market.

The third line of cases has upheld local requirements to use a particular waste disposal facility when the requirement was connected with the government's purchase or sale of waste collection and disposal services such that the government qualified as a "market participant." *See Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 56 (2nd Cir. 1998); *Red River Serv. Corp. v. City of Minot*, 146 F.3d 583, 590 (8th Cir. 1998); *USA Recycling v. Town of Babylon*, 66 F.3d 1272 (2nd Cir. 1995).

These cases demonstrate that different local solid waste disposal regulations have differing practical effects on interstate commerce and, consequently, must be examined on a case-by-case basis, as this Court instructed in *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994). While Petitioner lumps all of the lower court decisions together under the rubric of "flow control schemes" in order to create the appearance that the decisions are in disarray, the reality is that with respect to each of the different categories of flow control rules, the courts have followed the analytical framework of *Carbone* and reached consistent outcomes. The Sixth Circuit conducted a detailed analysis of the practical effects of the District's open, fair, and non-exclusive facility designations herein, and like the courts in *Houlton* and *Harvey & Harvey, supra*, concluded that such designations do not violate the dormant Commerce Clause.

CONCLUSION

The District's facility designations are designed to help the District address several local solid waste management issues in a manner that does not give preference to local facilities, or hoard waste or waste disposal capacity for the benefit of local interests. The District used an open, fair and non-exclusive process for granting the facility designations so that out-of-state and in-state facilities would have equal access to the District's waste, and to minimize the designations' impact, if any, on interstate commerce. Employing the same analytical framework that this Court articulated in *Carbone* and numerous other dormant Commerce Clause decisions, the Sixth Circuit correctly determined that the District's regulation is permissible. Maharg is undoubtedly upset that the Jay County landfill decided that it did not need or want the District's waste. The dormant Commerce Clause does not, however, protect Maharg's right to use a specific landfill. Nor should this Court concern itself about Maharg's protestations when Maharg itself has not applied to the Board for a waiver. Whether Maharg may deliver the District's waste to the Jay County landfill is not a significant constitutional issue that demands the attention of

Congress or this Court. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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